LIBRARY
SUPREME COURT. U. S.

No. 916

Office - Supreme Court, U.S.
FILED
APR 22 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, .C.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CARGILL, INC., AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

HORACE T. ATKINS
Proctor for Respondent
70 Pine Street
New York 5, N. Y.

INDEX

PAGE

Statement 1

Facts 2

Cost of Clearing the Channel 5

The Decision of the District Judge on Damages 7

Questions Involved 9

ARGUMENT 10

POINT I

The District Court's opinion was not "clearly erroneous" 10

POINT II

The cargo owner acted reasonably in not undertaking the expense involved in salvage operations 12

POINT III

The cargo owner was not required to transport wet wheat, "admittedly unfit for human consumption," to New York City, and there condition it into "feed wheat" for the New York City market in an endeavor to minimize damages, as Albany was the port of destination, and as the Army Engineers in Albany, acting for the Secretary of War, had taken possession of the sunken barges and also the submerged wheat in the barges, in order to clear the channel, pursuant to statutory authority already quoted herein 14

CONCLUSION 16

TABLE OF CASES CITED:

PAGE

Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co., 98 Fed. (2d) 694, 696 11

Smith v. Condry, 42 U. S. 28 8

Standard Marine Insurance Co. Ltd. v. Scottish Metropolitan Assurance Co., 283 U. S. 284; 75 L. Ed. 284 .. 12

The Baltimore v. Rowland, 75 U. S. (8 Wall.) 377 13

The City of New York, 23 Fed. 616 8

The Scotland, 105 U. S. 24 ..... 12, 15

The Umbria (C. C. A., 2d Cir.), 59 Fed. 489 15

Other Authority Cited:

Summary Removal of Water Craft Obstructing Navigation, §415 (Title 33 U. S. C.; 30 Statutes at Large 1154; Act of March 3, 1899, Chapter 425, Section 20) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

Petitioners,

—against—

CARGILL, INC.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CARGILL, INC., AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement

This brief is submitted in opposition to a petition for a writ of certiorari by Tug ELLEN S. BOUCHARD, Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., petitioners, to review a *Per Curiam* Opinion of the United States Court of Appeals for the Second Circuit affirming "on Judge Foley's Opinion, filed June 4, 1957," a Final Decree in Admiralty (RA 71)* entered upon an Order of the United States District Court for the Northern District of New York which reversed the Findings and Conclusions of the Commissioner appointed by the District Court to ascertain and compute the amount of damages sustained by respondent herein, resulting from

* "PA" refers to Petitioner's Appendix in the Court of Appeals; "RA" refers to Respondent's Appendix in that Court.

the sinking of two canal barges with their respective cargoes of wheat, totaling 37,500 bushels, following a collision in the Hudson River near Albany, New York, on September 25, 1953.

Facts

The facts are fully set forth in the Opinion of the District Court (PA 90a-97a) reported in 1957 American Maritime Cases 1563, but not officially reported. The report of the Commissioner (PA 73a-89a) is not officially reported.

A synopsis of occurrences and dates pertinent to this petition may be stated chronologically as follows:

—— Friday, September 25, 1953

At 2:20 A. M. Collision occurred in the Hudson River adjacent to Albany, resulting in the sinking of the barge MARION O'NEILL with her cargo of 18,500 bushels of wheat, and the barge MAE LOWERY with her cargo of 19,000 bushels of wheat. (Opinion, Appellants' Appendix, 54a, fol. 179.)

At 4:00 A. M. Tug Kehoe, proceeding down river, collided with sunken barge MAE LOWERY. (Opinion, Appellants' Appendix, 55a, fol. 179.)

At 5:26 A. M. Owner Lowery abandoned the barges to the Government (66a).

U. S. Army Engineers at Albany determined sunken craft interfered with and endangered navigation, and considered blowing up the barges immediately to clear the navigable waters of the obstruction thereby caused (17a).

About 9:00 A. M. Inland Survey Bureau, Inc., marine surveyors engaged by marine underwriters "for the pur-

pose of ascertaining if it was possible to economically salvage the cargo" (14a).

About 9:00 A.M. Melville J. Horn, President of Inland Survey Bureau, Inc., dispatched Mr. Hylind, an employee of Inland Survey Bureau, Inc., to Albany to investigate the situation, and the possibility of arranging for the sale of the damaged wheat, "as is, where is," in the sunken barges. (Appellants' Appendix, 12a, fol. 26.)

About 9:00 A.M. Captain Westerfield, in charge of the U. S. Army Engineers in New York, telephoned Mr. Horn and asked, "What are you going to do with the cargo at Albany; *because the wrecks are a menace to navigation?*" (16a, 17a)

Saturday, September 26, 1953

Horn discussed the matter of clamming out what wheat remained in the barges with a marine surveyor, Connie Ezmark. Horn and Ezmark estimated it would cost not less than $12,000 in the way of hiring equipment to salvage the cargo. *If salvage of cargo was undertaken, the U. S. Army Engineers would have required the salvor of cargo also to remove the wrecks from the channel and dispose of the wrecks, all at the expense of such salvor.* Connie Ezmark, a salvor and interested in barges, would not undertake the salvage job, as he had examined the situation and did not consider the barges worth the expense of salving them (22a). (Appellants' Appendix, 15a.)

Monday, September 28, 1953

At 11:43 A.M. Inland Survey Bureau, Inc. sent the following telegram to Ambrose F. Brennan, Engineer in Charge, U. S. Army Engineers, Albany (Record, 55):

"Re barges MARION O'NEILL and MAE LOWERY sank Albany. Based on our investigation we have con-

cluded that it is not commercially expedient to enter upon any salvage operations with respect to the cargoes on each of the barges and therefore on authority of cargo underwriters we are taking no further steps to enter upon any attempted salvage operation with respect to these cargoes. Thanks for your fine co-operation and patient consideration."

Tuesday, September 29, 1953

The Army Engineers, after giving notice that sealed bids would be received, opened the following bids: from Cargo Recovery Corporation, 10¢ per bushel; from Millhurst Mills a bid of 10¢ per bushel; from Universal Grain Company a bid of $2,945 on the assumption that 19,000 bushels of wet wheat would be salved from the barges and loaded by the Army Engineers at Albany on scows furnished by Universal Grain Company (62a, 63a).

The bid of Universal Grain Company was accepted. (Appellants' Appendix, 44a.)

Although a total of 29,555 bushels were clammed out of the wrecks by the Government and placed on Government scows, 11,555 bushels of such quantity were dumped. The balance, or total quantity of wet wheat recovered, namely 18,400 bushels, was placed by the Army Engineers on scows furnished by the buyers, Universal Grain Company (55a, 56a).

U. S. Army Engineers commenced work of clearing channel of barge MARION O'NEILL on Tuesday, September 29th. (Appellants' Appendix, 43a.)

Sunday, October 4, 1953

Barge MARION O'NEILL was moved out of channel to the east shore of the river by the U. S. Army Engineers. (Appellants' Appendix, 43a.)

Monday, October 5, 1953

Commenced work of clearing the channel of the barge MAE LOWERY. (Appellants' Appendix, 43a.)

Friday, October 9, 1953

Barge MAE LOWERY moved out of the channel to the east shore of the river. (Appellants' Appendix, 43a.)

Friday, October 23, 1953

Government received bids for removal of the wrecks from Rensselaer shore and their disposal as follows: R. J. Campbell offered to remove the wrecks and dispose of them for the sum of $8,200. Merritt-Chapman & Scott Corporation would undertake same work if paid $9,774. Connie Ezmark (Island Marine Contracting Corporation) would undertake the same work if paid $7,771. (Appellants' Appendix, 48a.)

Island Marine Contracting Corporation was awarded the contract (65a).

The Cost of Clearing the Channel

The cost, based on the Government's accounting, to remove the wrecks and clear the channel, and incidentally salvage some 18,400 bushels of wet and swollen grain, which had become unfit for human consumption, amounted to $9,980.43. To such sum should be added the price which the Government paid to remove the wrecks from the Rensselaer shore and destroy them. This latter expense amounted to $7,771. Thus the total cost to the Government of clearing the channel and disposing of the wrecks amounted to $17,751.43. The amount derived from the sale by the U. S. Army Engineers of the damaged grain was $2,945. Hence the collision and its consequences cost the Government the sum of $14,806.43 (64a, 65a).

The authority of the U. S. Army Engineers summarily to remove the wrecks, and to sell that part of the cargo which was not completely lost, is in virtue of the Act of March 3, 1899, Chapter 425, Section 20; 30 Statutes At Large 1154; Title 33, Navigation and Navigable Waters, United States Code Annotated, Section 415.

We quote Section 415 of Title 33, United States Code Annotated:

"§415. SUMMARY REMOVAL OF WATER CRAFT OBSTRUCTING NAVIGATION.

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in the foregoing section, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, *the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused,* using his best judgment to prevent any unnecessary injury; *and no one shall interfere with or prevent such removal or destruction: Provided,* That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: And provided further, *That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States*

for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States. (Mar. 3, 1899, c. 425, §20, 30 Stat. 1154.)" (Emphasis supplied.)

The Decision of the District Judge on Damages

On the facts above stated, some of which appear in the record of the trial, and some of which appear in testimony before the Commissioner, Judge Foley decided that the conclusion was "inescapable that the established rule as to the duty to minimize was too harshly and narrowly interpreted (by the Commissioner) without due regard to the actualities and realities of the situation present at and shortly after the collision." (Appellants' Appendix, 92a, fol. 232.)

In its Decision on damages, the District Court observed: (Appellants' Appendix, 95a, fol. 235.)

> "Most vital of all to justify the estimate of Horn that it would cost $12,000.00 is the fact it actually cost the Army Engineers $17,751.43 for the entire operation. The wheat sold by the Army only obtained $2,945.00. It is interesting to note that the private bids requested by Inland were only slightly below the amount which was received by the Army Engineers after competitive bidding pursuant to the Statute. This net actual expenditure of $14,806.43 cannot be laughed off as government bookkeeping or the result of a 'give-away' based merely upon innuendo without basis in fact. To corroborate further the intelligence and competency of Inland, the hulls were salvaged by

> Connie Ezmark's firm, the man Inland originally contacted on the whole problem. Again, this contract was awarded after competitive bidding."

The District Judge held, and we submit correctly held, citing *Smith* v. *Condry*, 42 U. S. 28, and *The City of New York*, 23 Fed. 616, that the proper measure of damages was the damage sustained by libellant-appellee *at the time and place of injury*. (Appellants' Appendix, 96a, fol. 235.) He also observed that the holding by the Commissioner that libellant-appellee should transport the wheat to the New York City market (*Albany was the destination*) again accentuated the extreme burden sought to be placed by a tortfeasor on an innocent party. (Appellants' Appendix, 96a, fol. 235.)

Judge Foley also observed: (Appellants' Appendix, 96a, fol. 236.)

> "There is not one fact I can find to support the exaggerated and speculative inference urged by Bouchard that someone obtained a tremendous bonanza from the purchase of this wet and damaged wheat. The combined experience and competence of Inland Survey and the Army Engineers in the ordinary course of their business are the best answer to such unproven speculation."

As libellant-appellee and respondent-appellant had stipulated that the value of the wheat immediately prior to the collision was $2.00 per bushel, and as the District Judge held that the collision resulted in a total loss of the wheat on both barges, damages were awarded to libellant in the amount of $75,000., plus the expenditure of $527.67 for the services of Inland Survey Bureau, Inc., for a total award of $75,527.67, with interest and costs.

Questions Involved

The questions presented, we submit, involve only questions of fact, and may be stated as follows:

1. Whether the determination of the sum of damages by the District Court was "clearly erroneous";

2. Whether the cargo owner acted reasonably under the circumstances in not undertaking the risk and expense involved in salvage operations;

3. Whether the cargo owner was required to transport wet wheat, "admittedly unfit for human consumption," to New York City, and there condition it into "feed wheat" for the New York City market in a highly speculative endeavor to minimize damages, notwithstanding Albany was the port of destination, and notwithstanding the Army Engineers in Albany, acting for the Secretary of War, had taken possession of the sunken barges and the submerged wheat in the barges, in order to clear the channel, pursuant to statutory authority already quoted herein.

ARGUMENT

POINT I

The District Court's opinion was not "clearly erroneous."

The District Court recognized the application of the "clearly erroneous" doctrine in sustaining the exceptions of libellant-appellee (respondent herein). Notwithstanding such doctrine, the District Court after due consideration based on oral arguments, on briefs, and on a review of the testimony, held that libellant's exceptions should be sustained and granted, and thereafter computed the damages and entered a final decree on such computation. We submit the decision and final decree of the District Court should not be set aside, unless this Court is of opinion that the decision and final decree of the District Court was "clearly erroneous."

We submit the decision of the District Court was not "clearly erroneous," but fully justified on the evidence that the cost of salvage proved to be $17,751.43, and that the proceeds of sale of the quantity of wet wheat clammed from the wrecks and landed on the purchaser's scows amounted to but $2,945.

Respondent herein proved conclusively, we submit, that if it had conducted operations to salvage what wet wheat remained in the wrecks, and, being unfit for human consumption, had incurred the expense of drying the wheat, and had assumed the risk and expense of transporting the wheat to New York City, and had endeavored to market it as "feed wheat," the result would be a case of increasing, rather than of minimizing the damages, a case of throwing good money after bad. "The proof of the pudding is the

eating." Petitioners should be thankful that respondent did not endeavor to minimize damages after receiving Horn's recommendation not to incur the additional expense of conducting salvage operations.

As the appeal stands before this Court, we submit this appeal should be adjudged as if the District Court itself had computed the damages in the first instance, and had not referred the computation to a Commissioner.

In support of our submission, we quote from the language used by Judge Learned Hand, speaking for the Court of Appeals, Second Circuit, in the case of *Navigazione Libera Triestine Societa Anonima* v. *Newtown Creek Towing Co.*, 98 Fed. (2d) 694, 696:

> "The claimant strongly presses upon us that we should treat his finding as 'presumptively correct' (Admiralty Rule 43½, 28 U. S. C. A. following section 723) and so we must; but it is 'subject to review,' and we 'reject' it because, like the district judge, we are 'fully satisfied that error has been committed.' However well Gebauhr may have appeared, he was willing to say that the loss of a tip of twenty inches from one of the flukes did not make the ship unseaworthy; all the other witnesses disagreed with that, including Bagger, the claimant's other expert. It is true that we should not disturb a verdict supported by his testimony, little as we might agree with it; *but the finding of a commissioner has no such immunity; in the end we are responsible as well for the facts as for the law*, and upon an issue where the testimony was so unevenly weighted we cannot accept a finding based upon the impression made by one witness even though the commissioner—mistakenly supposing that this added force to his finding—assured us how persuasive he found him. We

think that the judge was therefore right in holding that twenty inches had been broken off, and that this made the ship unseaworthy." (Emphasis supplied.)

POINT II

The cargo owner acted reasonably in not undertaking the expense involved in salvage operations.

The law applicable is that damages are computed on the basis of the value of the cargo at the time and place of collision, subject to the limitation that the cargo owner must exercise reasonable diligence, under the circumstances of the case, not only not to increase the damages, but in the exercise of reasonable diligence to reduce the damages. That such was the law of the case was advanced by proctors for petitioners, accepted as correct by proctors for respondent herein, and applied by the District Court.

Thus in the leading case of *The Scotland*, 105 U. S. 24; 26 L. Ed. 1001, the rule was stated as follows:

> "The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest; but without any allowance for anticipated profits."

And in the case of *Standard Marine Insurance Co. Ltd. v. Scottish Metropolitan Assurance Co.*, 283 U. S. 284; 75 L. Ed. 284, the rule of computing damages to cargo lost at sea in collision cases was stated as follows:

> "It has long been the accepted rule, in the law of maritime torts and of maritime insurance, that the recoverable value of cargo lost or damaged at sea is that at time and place of shipment, without allowance for increase of value or anticipated profits. Smith v. Condry, 1 How. 28, 35, 11 L. ed. 35, 37; The Vaughan

(The Telegraph v. Gordon) supra (14 Wall. 267, 268, 20 L. ed. 808, 809); The Scotland (National Steam Nav. Co. v. Dyer), 105 U. S. 24, 35, 26 L. ed. 1001, 1005; The Aleppo (D. C.) 7 Ben. 120, Fed. Cas. No. 158; The Umbria (D. C.) 59 Fed. 489, 490; Phillips, Ins. §§1226, 1229; 1 Arnould, Marine Ins. 11th ed. §365; see The Old Reliable (C. C. A. 2d) 262 Fed. 108, 110; Guibert v. The George Bell (D. C.) 5 Hughes, 172, 3 Fed. 581, 584, 585. The cargo is placed at risk when the voyage begins. Its value then is the measure of the risk and of the loss suffered if the cargo is lost or damaged on the voyage. Market value at destination on the date of the loss is not the measure, for that was not its value at the place of loss. To attribute to the cargo the market value at destination is to measure, not the loss, but the profits which would have accrued if the voyage had been completed, and if the market price at the time of loss had continued to be the market price at the time of arrival."

Proctors for petitioner refer to the decision of this Court in *The Baltimore* v. *Rowland*, 75 U. S. (8 Wall.) 377, urging the case at bar is in conflict with such decision. We submit the decision of *The Baltimore, supra*, not only is not in conflict with the submissions of respondent herein, but that such decision supports respondent's position.

The instant case involves a perishable cargo, namely wheat. *The Baltimore, supra*, involved a non-perishable cargo, namely coal. That this Court recognized in *The Baltimore* case, *supra*, the distinction between perishable cargo and cargo not perishable, clearly appears in the language of Mr. Justice Clifford at pages 386, 387, of the opinion. We quote:

"Experience shows that in many cases where the injured vessel is sunk, especially when the disaster

happens in rivers or harbors, the vessel may be raised at moderate expense, and that the cargo, *if not perishable,* may be restored to the shipper, *or carrier forward to the port of destination,* and the rule in such cases is to award such damages only as will compensate the owners for the loss incurred, which is held to include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight *and for the damage to the cargo,* and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage." (Emphasis supplied.)

POINT III

The cargo owner was not required to transport wet wheat, "admittedly unfit for human consumption," to New York City, and there condition it into "feed wheat" for the New York City market in an endeavor to minimize damages, as Albany was the port of destination, and as the Army Engineers in Albany, acting for the Secretary of War, had taken possession of the sunken barges and also the submerged wheat in the barges, in order to clear the channel, pursuant to statutory authority already quoted herein.

Respondent cargo owner was not required, we submit, to transport wet wheat unfit for human consumption, from the point of destination of the voyage on which the collision occurred, namely Albany, to New York City, and there condition and market the wheat as feed wheat in an endeavor to minimize damages, particularly as the probabilities at the time were that such course would increase rather than decrease the damages.

The rule of damages in a collision case is based on "the prime cost or market value of the cargo at the place of shipment, with all charges of loading and transportation, including insurance and interest; but without any allowance for anticipated profits," which adds up to its value at the time and place of the loss. *The Scotland*, 105 U. S. 24. If damaged cargo is carried to destination (in the instant case Albany), "the correct rule of damages is to allow the difference between the market value of the goods if uninjured and their value in their damaged condition." *The Umbria* (C. C. A., 2d Cir.), 59 Fed. 489.

The District Court recognized this rule, stating (Appellants' Appendix, 95a, fol. 235):

> "There is nothing between the testimony of DeMars, a hull surveyor, and the two alleged experts from New York, one a dairy farmer, in the effort to establish the value of animal feed in the New York market. Even if such evidence were reliable and in closer harmony with reality, it is questionable whether the New York City value would legally be the proper market for the ascertainment of value in this case."

CONCLUSION

We submit this petition invloves only questions of fact, the issue being whether respondent herein did what was legally required under the circumstances to minimize the loss. The District Court decided this issue in favor of respondent herein. The Court of Appeals affirmed on the Opinion of the District Judge.

We submit the petition for a writ of certiorari should be denied.

Respectfully submitted,

HORACE T. ATKINS
Proctor for Respondent
Cargill, Inc.
70 Pine Street
New York 5, N. Y.